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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONYIO SHAWN MELVIN,

Defendant and Appellant.

D051727

(Super. Ct. No. SCD164913)

APPEAL from a judgment of the Superior Court of San Diego County, David J. Danielson, Judge. Reversed and remanded with directions.

In 2002 Antonyio Shawn Melvin pleaded guilty in case No. SCD164913 to escaping without force or violence from a work furlough program. (Pen. Code,¹ § 4532, subd. (a)(1).) Melvin also pleaded guilty in case No. SCE218568 to possessing an explosive (Health & Saf. Code, § 12305) and fleeing from a police officer (Veh. Code, § 2800.2.) Under the plea agreement, the court (Judge Exarhos) sentenced Melvin to the

¹ All further statutory references are to the Penal Code unless otherwise specified.

middle term of three years for possessing an explosive and a consecutive eight months for fleeing from a police officer. Judge Exarhos also imposed a concurrent one-year one-day term for the nonviolent escape. The court suspended execution of sentences and placed Melvin on probation for three years, conditioned on serving 365 days in jail.

In 2007 the court revoked Melvin's probation in both SCD164913 and SCE218568. At sentencing, the court (Judge Danielson) imposed the previously suspended sentences but found the concurrent sentence for the escape was unlawful under section 4532, subdivision (c)(5). Accordingly, Judge Danielson sentenced Melvin to prison for three years eight months (SCE218568) plus a consecutive term of one year one day (SCD164913).

On appeal Melvin contends the court erred by imposing a consecutive rather than concurrent term for the escape conviction. The People concede the sentence for escape should have been concurrent. We agree and accordingly reverse the judgment.

FACTS

The underlying facts of the offenses are not material to this appeal.

DISCUSSION

Appellant relies on *People v. Gamble* (2008) 164 Cal.App.4th 891 to support his argument that a consecutive term is not mandatory for a conviction of escape under section 4532, subdivision (a)(1). Thus, appellant asserts, and the People agree, the concurrent sentence originally imposed by Judge Exarhos was not unauthorized as found by Judge Danielson.

A consecutive sentence is not mandatory for a violation of section 4532, subdivision (a)(1)—nonviolent escape by a misdemeanor. (*People v. Gamble, supra*, 164 Cal.App.4th at p. 894.) Only sentences imposed under section 4532, subdivision (c), not applicable here, mandate consecutive terms. (*Id.* at p. 898.)

The record shows that appellant, after having been convicted of a misdemeanor, unlawfully escaped or left a work furlough center in violation of section 4532, subdivision (a)(1). Because the concurrent term imposed by Judge Exarhos was not unlawful, Judge Danielson's ultimate sentence was erroneous. Appellant is entitled to have his sentences run concurrently.

The People also agree with appellant that the proper disposition is to reverse the judgment (sentence) and direct the Department of Corrections to deduct from appellant's parole term any time he spent in prison past his lawful release date. (*In re Phelon* (2005) 132 Cal.App.4th 1214, 1221-1222.) We also believe this is the appropriate disposition.

DISPOSITION

The judgment is reversed and the matter is remanded to the superior court with directions to impose the sentence in SCD164913 concurrent to the sentence in SCE218568. The superior court is directed to forward an amended abstract of judgment to the Department of Corrections. To the extent appellant has spent any time in prison

past his lawful release date, the Department of Corrections is directed to deduct such time from appellant's parole term.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

McINTYRE, J.